Supreme Court, U. S.
FILED
APR 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1486

WAYNE RONALD WHITAKER, a/k/a WITTAKER,
Defendant-Petitioner,

versus

UNITED STATES OF AMERICA,
Plaintiff-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Preston Henrichson
222 West Cano
Edinburg, Texas 78539
Attorney for Appellant
Richard C. Smith
Of Counsel

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 · 504/822-1611

SUBJECT INDEX

	Page
Subject Index	i
Constitutional Authorities	i
Statutory Authorities	i
Table of Cases	iii
Caption and Statement of Petition	1-2
Statement of Jurisdiction	2
Questions for Review	3-5
Constitutional and Statutory Provisions	5-8
Statement of the Case	8-9
Statement of Facts	9-11
Argument and Authorities	11-21
Certificate of Service	22
Appendix	1a
Memorandum and Order of the District Court	1a
Judgment and Commitment Order	11a
Order Affirming, U.S. Court of Appeals, 5th Circuit	13a
Petition for Rehearing	14a
Order Denying Petition for Rehearing	27a
Motion to Stay Issuance of Mandate	28a
Order Denying Motion to Stay Issuance of Mandate	30a

TABLE OF CASES (Continued)

Page

CONSTITUTIONAL PROVISIONS

Fourth Amendment, U.S. Const. 5,21

Fifth Amendment, U.S. Const. 5-6,21

Ninth Amendment, U.S. Const. 6,21

Fourteenth Amendment, U.S. Const. 6,21

STATUTORY PROVISIONS

19 USC 482 6-7

19 USC 1581 7

19 USC 1582 7-8

TABLE OF CASES

Carroll v. United States, 267 US 132, 154 (1955) 14

Morales v. United States, 378 F 2d 187 (5th Cir. 1967) 15

Plazola v. United States, 291 F 2d 56, 61 (9th Cir. 1961) 14

United States v. Almeida-Sanchez, 413 U.S. 266 (1973) 15

United States v. Bowman, 502 F 2d 1215 (5th Cir. 1974) 14,15

United States v. Brignone-Ponce, 95 S. Ct. 2574, 2585 (1975) 15

United States v. Bursey, 491 F 2d 531 (5th Cir. 1974) 17

United States v. Hill, 430 F 2d 129 (5th Cir. 1970) 15

TABLE OF CASES (Continued)

Page

United States v. Kandlis, 432 F 2d 132 (9th Cir. 1970) 14

United States v. Lara, 517 F 2d 209 (5th Cir. 1975) 16

United States v. Maggard, 451 F 2d 502 (5th Cir. 1971) 14

United States v. Mejias, 452 F 2d 1190 (9th Cir. 1971) 14

United States v. Meola and Wittaker, Crim. No. 75-B-148 (S.D. Tex. filed July 24, 1975) ... 12,20

United States v. Nieto, 510 F 2d 1118 (5th Cir. 1975) 20

United States v. Ortiz, 95 S. Ct. 2585 (1975) 15

United States v. Poindexter, 429 F 2d 510 (5th Cir. 1970) 14

United States v. Reagor, 441 F 2d 252 (5th Cir. 1971) 15

United States v. Selby, 407 F 2d 241 (9th Cir. 1969) 14,21

United States v. Speed, 497 F 2d 546 (5th Cir. 1973) 13

United States v. Terry, 446 F 2d 579 (9th Cir. 1971) 14

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

WAYNE RONALD WHITAKER, a/k/a WITTAKER,
Defendant-Petitioner,

versus

UNITED STATES OF AMERICA,
Plaintiff-Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

I.

Wayne Ronald Whitaker aka Wittaker petitions the Supreme Court of the United States for a Writ of Certiorari reviewing the Judgment of conviction and commitment and the Memorandum and Order of the United States District Court for the Southern District of Texas, Brownsville Division, in this cause, then numbered 75-B-148, copies of which Judgment and

Memorandum are appended hereto, and petitions this Honorable Court for review of the Judgment affirming the District Court order by the United States Court of Appeals for the Fifth Circuit, in this cause, then numbered 75-3536, a copy of which Judgment is appended hereto, and further petitions for review of the order denying the Petition for Rehearing by the said United States Court of Appeals, a copy of which order is also appended hereto.

II.

STATEMENT OF JURISDICTION

The District Court Memorandum and Order containing the trial court's findings was dated and entered on July 24, 1975. The Defendant was adjudged guilty as charged, was convicted and was sentenced in open court on August 22, 1975, as evidenced by written Judgment and Order of Commitment which was dated and entered on August 27, 1975. Defendant's notice of appeal was filed on the same date. The Judgment of the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court in a per curiam opinion dated and entered on February 10, 1976. The Defendant filed a Petition for Rehearing on February 24, 1976 and the same was denied by the said Court of Appeals by order dated and entered on March 15, 1976. The jurisdiction of this Court for discretionary review of these decisions is conferred by the United States Constitution, Article 3, Section 2 and by statute (28 USC 1254(1)).

III.

QUESTIONS FOR REVIEW

The following questions are presented for review by this Honorable Court:

A. IS THE FEDERAL GOVERNMENT ENTITLED TO EXTEND ITS BORDER CUSTOMS-LIKE SEARCH POWER 60 MILES INTO THE UNITED STATES MERELY BY KEEPING SURVEILLANCE OVER A VEHICLE WHICH HAS BEEN CLEARED AND RELEASED AFTER A THOROUGH BORDER SEARCH?

B. DOES A CAREFUL, THOROUGH AND NEGATIVE BORDER SEARCH (WHICH SEARCH SATISFIES THE SEARCHING CUSTOMS OFFICERS THAT NO CONTRABAND IS CONTAINED IN AN ENTERING VEHICLE), EFFECTIVELY INVALIDATE AND NEGATE PRIOR INFORMATION THAT CONTRABAND OBTAINED IN MEXICO IS CONTAINED IN THE VEHICLE?

C. WHEN PRIOR INFORMATION ALLEGES THAT CONTRABAND WAS OBTAINED IN ACAPULCO, MEXICO, FOR SMUGGLING INTO THE UNITED STATES IN SECRET COMPARTMENTS IN A CERTAIN VEHICLE, AND WHEN SUCH INFORMATION IS NEGATED BY THOROUGH AND NEGATIVE CUSTOMS SEARCH OF THE VEHICLE. IS SUCH INFORMATION REVIVED FOR PROBABLE CAUSE SEARCH PURPOSES BY CONTINUOUS VEHICLE SURVEILLANCE AND THE

FOLLOWING OBSERVATIONS: (1) THE VEHICLE DRIVER PICKS UP AN APPARENT PEDESTRIAN ACQUAINTANCE WITH KNAPSACK IN A RESTAURANT PARKING LOT SIX OR SEVEN BLOCKS NEAR THE BRIDGE, WHO "COULD HAVE BEEN COMING FROM ANYWHERE"; AND (2) THE DRIVER TRAVELS 60 MILES WEST AND NORTH FROM THE BRIDGE POINT OF ENTRY IN SAID VEHICLE WITH FLORIDA LICENSE PLATES BY WELL TRAVELLED U. S. HIGHWAY 281 EXCEPT FOR A ONE TO TWO MINUTE STOP DOWN A SIDE ROAD FOR AN UNKNOWN PURPOSE BUT WITHOUT ANY UNUSUAL ACTIVITY HAVING BEEN OBSERVED DURING THE STOP?

D. DO SUCH OBSERVATIONS OUTLINED IN C. ABOVE BY THEMSELVES CONSTITUTE PROBABLE CAUSE (OR EVEN REASONABLE SUSPICION) TO STOP THE VEHICLE AND TO DISASSEMBLE AND SEARCH THE INTERIOR CONSTRUCTION OF THE CAMPER WITHOUT A SEARCH WARRANT DESPITE THE THOROUGH AND NEGATIVE SEARCH OF THE ENTIRE CAMPER AT THE BRIDGE AND DESPITE THE ADMISSION BY THE SEARCHING OFFICER THAT HE DID NOT BELIEVE THAT THE VEHICLE CONTAINED CONTRABAND WHEN THE VEHICLE LEFT THE BRIDGE, AND DESPITE THE OFFICER'S ADMISSION THAT THE CONTRABAND IN QUESTION WAS FOUND IN A LOCATION WHERE IT COULD NOT HAVE BEEN PLACED DURING THE SURVEILLANCE BUT WHICH MUST HAVE BEEN PRESENT BEFORE THE VEHICLE CROSSED THE BRIDGE?

E. ARE THE CIRCUMSTANCES OF THIS CASE CONSTITUTIONALLY SUFFICIENT TO SUPPORT A FEDERAL STOP, DISASSEMBLY AND SEARCH OF THE INTERIOR CONSTRUCTION OF A VEHICLE OF A U. S. CITIZEN WITHOUT A WARRANT ON A MAJOR ARTERIAL HIGHWAY SOME 60 MILES INTO THE UNITED STATES FROM POINT OF ENTRY OF THE VEHICLE, WHEN THE VEHICLE HAS BEEN UNDER CONSTANT SURVEILLANCE SINCE ENTRY AND AFTER THE VEHICLE WAS THOROUGHLY SEARCHED AND CLEARED IN A BORDER CUSTOMS SEARCH AT THE BRIDGE?

IV.

The Constitutional provisions and statute which this Petition involves are set out verbatim as follows:

A. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (U.S. Const. Amend. 4).

B. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation" (U.S. Const. Amend. 5).

C. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (U.S. Const. Amend. 9).

D. "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (U.S. Const., Amend. 14).

E. "Search of vehicles and persons. Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or

person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial" (R.S. § 3061; Act July 18, 1866, c. 201, § 3, 14 Stat. 178; 19 USC 482).

F. "Any officer of the customs may at any time to go on board of any vessel or vehicle at any place in the United States . . . and search the vessel or vehicle and every part thereof and any person, trunk, package or cargo on board . . ." (19 USC 1581).

G. "(A)ll persons coming into the United States from foreign countries shall be

liable to detention and search by authorized officers or agents of the government . . ." (June 17, 1930, c. 497, Title IV, Part V, Sec. 582, 46 Stat. 748; 19 USC 1582).

V.

STATEMENT OF THE CASE

The Petitioner, Wayne Ronald Whitaker, aka Wittaker was convicted by the Federal District Court of the Southern District of Texas, sitting at Brownsville, of counts I, II, and III of an indictment numbered CR75-B-148, filed in the Federal District Court on the 23rd day of April, 1975. The indictment alleged: (1) that Defendant did knowingly and intentionally import into the United States from Mexico approximately 126 pounds of Marijuana, contrary to Section 952a, Title 21, United States Code; and (2) that Defendant conspired with one John M. Meola and other unknown persons to unlawfully possess with the intent to distribute a quantity of Marijuana in violation of Sections 846 and 841(a)(1), Title 21, United States Code; and (3) that Defendant did knowingly and intentionally possess with the intent to distribute approximately 126 pounds of Marijuana contrary to Section 841(a)(1), Title 21, United States Code. Prior to trial, Defendant filed a timely motion to suppress the evidence. On June 10, 1975, the Court entertained Defendant's Motion to Suppress and a hearing thereon was held. On June 16, 1975, Appellant waived a jury trial and requested the Court to rule on the case based upon the evidence already presented. On July 24, 1975, the Court entered its findings in a written Memoran-

dum and Order which denied the Defendant's Motion to Suppress and which found the Defendant guilty of all three counts of the indictment. In open court on August 22, 1975, the Defendant was adjudged guilty of all counts and was sentenced and committed to the custody of the Attorney General for imprisonment for a period of four years and a special parole term of two (2) years on each count, all to be served concurrently. The written order of Judgment and commitment was dated and entered on August 27, 1975. Notice of Appeal was filed on the same date. The judgment of the Trial Court was affirmed and a rehearing was denied by the United States Court of Appeals for the Fifth Circuit. This petition for review follows.

VI.

STATEMENT OF FACTS

On February 25, 1975, U. S. Customs Agents in Brownsville, Texas, received information that a 1971 Black Chevy pickup truck with a camper on the back, with false compartments in the gas tank and with a license number including IGK would be driven by a man named Whitaker across the International Border from Matamoros, Mexico, with an unknown amount of Marijuana aboard (R. 12-16, 17-19, 39). When on February 27, 1975, at about 8:00 P.M., a vehicle matching this description approached the point of entry into the United States at Brownsville, Texas, the Customs Agent, acting upon the information previously received, directed it to the secondary search area, (R. 19-22). An extensive secondary search was conducted by Officer Gomez with assistance from several other

customs officers (R. 20-22, 24-32, 33-37). After a thorough search they satisfied themselves that there was no contraband in the truck, and they determined that no grounds for arrest or seizure existed (R. 28-30, 34-36, 47). At approximately the same time, Customs Officer Kitchen was informed that the bridge search revealed nothing and the agents were prepared to release the vehicle from the border after searching the cab, camper, engine compartment, undercarriage, gas tanks, and searching for secret compartments (R. 29-30, 36-37, 66). U. S. Agent Kitchen positioned himself to trail the truck and Officers Gomez and Fehlis released it to travel to the interior of the Country (R. 29, 36-37, 47-48).

From the bridge the vehicle was followed 5-6 blocks to a restaurant where an individual later identified as Co-defendant John M. Meola joined the Appellant and proceeded to a gas station, to an eating establishment and out of Brownsville on U. S. Highway 281 in a westerly direction (R. 48-49, 53, 69, 71).

After one hour of travel, the vehicle turned down a dirt road, off of the main highway 281, and returned 3-4 minutes later (R. 49-52). The vehicle was stopped on the dirt road for one to two minutes, (R. 52), and was under constant surveillance from helicopter and from 6 tailing vehicles with the assistance of binoculars (R. 52-53, 67-68). No activity within or without the pickup was noted, no lights were seen, and the vehicle was not stopped long enough to load the contraband which was later found in secret compartments (R. 52-53, 64-66, 68-69). After its return to Highway 281 the vehicle continued its westward journey (R. 52). Constant surveillance was maintained by a cadre of six customs vehicles and a helicopter until the vehicle reached a point approximately three miles south of Edinburg, Texas, and approximately 60 miles from the point of entry into the United States (R. 40-41, 67-69, 73). At approximately 10:15 P.M., ten to twelve officers stopped the vehicle at gunpoint and without consent or warrant conducted a second extensive search during which the interior construction of the camper was disassembled. The disassembly of the camper resulted in a seizure of approximately 126 pounds of Marijuana, (R. 40-45, 63-65). The Marijuana found could not have been secreted during the surveillance because it required camper disassembly and therefore it had been present in the camper before the vehicle crossed the bridge into the United States (R. 63-66, 68-69). It is this second search of which the Petitioner complains.

VII.

ARGUMENT AND AUTHORITIES

The Defendant's motion to suppress should have been granted by the trial court because the search in question was unreasonable. The second search occurred without the benefit of a warrant, probable cause, consent, or any exception to the fourth amendment protection the Constitution of the United States provides against such searches. The extent of the search and the disassembly of the camper also was unreasonable. All customs agents concerned were of the opinion that the vehicle did not contain contraband at the time it was released into the interior. (R. 22, 29-30, 47-48), and it would have been physically impossi-

ble for the defendant and his companion to have secreted the contraband in the interior construction of the camper during the surveillance (R. 68-69). Nevertheless, the customs agents suddenly stopped the defendant's vehicle at gun point, some sixty miles from the point of entry into the United States and some two hours and fifteen minutes after entry, and conducted what they considered to be an unlimited search of the defendant's vehicle (R. 40-45, 63-65, 67-69, 73).

In an artful attempt to construct a legal basis for this intrusion, the trial court adopted three alternative theories of justification, each of which are inconsistent with the facts of the case as evidenced by the record. In a Memorandum Opinion, the trial court found alternatively:

> A. That the search was a border search;
> B. That there was probable cause to search the vehicle based upon the agents' observations during surveillance after the vehicle left the bridge and entered Texas; and
> C. That there was probably cause to search based upon some fictional corroboration of the informant's information about a Mexican connection (U.S. vs. John M. Meola and Wayne Ronald Whittaker, Crim. No. 75-B-148 (S.D.Tex., filed Jul. 24, 1975)).

We will address each of these alternative findings in the following entitled subparagraphs: A. Not a Border Search; B. No Probable Cause for Search Based upon Texas Connection; C. No Probable Cause for Search Based upon Mexican Connection.

A. *Not a Border Search.* In denying the Defendant's Motion to Suppress, the Court erred in finding that the search in question was a border search.

As stated by Judge Morgan in *United States vs. Speed*, 497 F 2d 546 (5th Cir. 1973) rev'd on other grounds, the test for determining a border search involves two questions; ". . . we must now ask if a search occurred either at the border or the functional equivalent thereof. It not, then it is not a border search." There is no evidence in the record nor even an indication that the government attempted to show the search in question occurred at the functional equivalent of the border or at the border itself.

In fact, all of the facts bearing on this question indicate the contrary. The second search occurred some 55-60 miles from the Brownsville International Bridge and point of entry on U.S. 281 a four lane major arterial highway which begins in Brownsville, Texas and proceeds in a generally westerly direction until it reaches a point some several miles south of Pharr, Texas, where it curves North, and proceeds through Pharr, to Edinburg, through Edinburg North to San Antonio, Austin, Dallas and points North (R. 40-41, 43, 67-69, 73). Appellant would invite the Court to consult any official Highway map for orientation and if necessary take judicial notice of the relevant conformation of the subject highway. Not only was the second search greatly removed in time and distance from the border as set out hereinabove, but significantly, the search occurred after the vehicle and driver cleared the border search at the bridge customs station and the driver was released to the interior of the

Country as a non-violator of U.S. Customs law (R. 19-20, 24, 28, 32, 33-37, 45-48). A line of cases from the 9th Circuit Court of Appeals indicate that when an initial border search is thorough and when it satisfies the inspecting officers that no contraband is aboard the vehicle, and after the citizen is released from the border and after the citizen actually leaves the bridge area, he is no longer subject to a subsequent customs border search (*U.S. v. Kandlis*, 432 F 2d 132 (9th Cir. 1970); *U.S. v. Selby*, 407 F 2d 241 (9th Cir. 1969); See *Plazola v. U.S.*, 291 F 2d 56, 61 (9th Cir. 1961)). As to those travelers lawfully within the country who are entitled to use the public highways, the customs officers need probable cause to search (*Carroll v. U.S.*, 267 US 132, 154 (1955)). In each of the cases in which we have been able to find a second search upheld as a border search, it would appear that the first search was not sufficiently thorough to satisfy the inspecting officers (*U.S. v. Maggard*, 451 F 2d 502 (5th Cir. 1971)), or that the person or vehicle had not left or had returned to the customs station or to the close proximity of the bridge or border (*U.S. v. Mejias*, 452 F 2d 1190 (9th Cir. 1971); *U.S. v. Terry*, 446 F 2d 579 (9th Cir. 1971); *U.S. v. Poindexter*, 429 F 2d 510 (5th Cir. 1970)). In our case, since the second search was removed from the border both in time and in distance, since the officers were satisfied with the first search, since it was thorough, and since the vehicle was released to the interior, we conclude that the second search did not occur at the border or at the functional equivalent thereof.

In finding the search was a border search, the trial court relies heavily on the *United States v. Bowman*, 502 F 2d 1215 (CA 5 1974), and cites same no less than

five times in its memorandum and order. As this Court well knows, *Bowman* was decided without the benefit of *United States vs. Almeida-Sanchez*, 413 U.S. 266 (1973). In *Bowman*, the Court of Appeals relied on several other *pre-Almeida-Sanchez* cases which support the theory that a search would be held constitutional if it was within general proximity to the border and the agents making the search had a reasonable suspicion that a customs violation had occurred (*U.S. vs. Bowman*, Supra, at p. 615 citing *Morales vs. United States*, 378 F 2d 187 (CA 5 1967), *United States vs. Hill*, 430 F 2d 129 (CA 5 1970), and *United States vs. Reagor*, 441 F 2d 252 (CA 5 1971)), all of which are based on the reasonable suspicion test. In considering the effect of the *Almeida-Sanchez* decision on *Bowman*, *Morales*, *Hill* and *Reagor*, it is clear that such reasonable suspicion is not a substitution for probable cause, except at the border itself.

Subsequent to the *Almeida-Sanchez* decision, this Honorable Court has reenforced this requirement of probable cause in the geographical areas neighboring the border (*United States vs. Brignone-Ponce*, 95 S. Ct. 2574, 2585 (1975)). In *Brignone-Ponce*, this Court held that reasonable suspicion no longer satisfies the requirements for a warrantless search in the fringe areas near the International Border. The distinction is a fine one in that when an officer does have reasonable suspicion, (i.e. that vehicles contain aliens, illegally in the Country), he has a right to stop and question but that any further search or detention must be based upon probable cause. In *United States vs. Ortiz*, 95 S. Ct. 2585 (1975), this Court further clarified its position as follows: ". . . in *Almeida-Sanchez* we rejected

the government's contention that the nation's strong interest in controlling immigration and the practical difficulties of policing the Mexican border combined to justify dispensing with both warrant and probable cause for vehicle searches by roving patrols near the border." In a recently reported case, *United States vs. Lara*, 517 F 2d 209 (CA 5 1975), the Fifth Circuit Court of Appeals held that reasonable suspicion no longer satisfies the requirements for a valid warrantless search by roving border patrol agents even in an area near the International Border. The Circuit Court did hold that stopping of the vehicle accompanied by brief interrogation of the occupants based upon a reasonable suspicion was not violative of the Fourth Amendment constitutional right when an officer's observations lead him to reasonably suspect that a particular vehicle's driver may have committed a customs or immigration violation. In the instant case, no such suspicion is present (R. 48), and no interrogation was conducted (R. 43-45, 63-65). Rather, a search which was unreasonably thorough was conducted immediately, which search included dismantling the camper (id).

Thus, upon review of the authorities, it appears clear that at the time Defendant was searched, the government was required to have probable cause, consent or a valid warrant in order for the search not to have been violative of Defendant's Fourth Amendment constitutional rights.

B. *No Probable Cause for Second Search Based on Texas Connection.* When the Defendant was searched at the U.S. Border, information received by the govern-

ment concerned a purchase of contraband in Mexico which was to be transported into the U.S. at Brownsville, Texas, (R. 12). The prior information was succinctly stated by the arresting officer in the record at page 39:

> "They had received information that a black 1971 Chevrolet pickup with a camper driven by Ron Whitaker would be going into Mexico, re-entering the United States at Brownsville, *and would have contraband hidden aboard the truck* (emphasis added)."

There was no information regarding a second person, passenger or hitchhiker. There was no information regarding any act to be accomplished in the U.S. (R. 15).

Once the government satisfied itself that no contraband had been brought into the U.S. by Defendant in his vehicle, he was released to travel in the U.S. (R. 22, 29-30). This does nothing to corroborate the confidential information but in fact destroys its reliability. In order to revive the information (if possible) the government should have received further information regarding a Mexican transaction. Instead the government points to two dubious occurrences which the Court holds were occasions when the Defendant ". . . could have picked up Marijuana." (R. 49-50). The Court fails to relegate the proper significance to these two occasions referred to above. The trial court observed that both occasions argueably could indicate a Texas connection or transaction. Analogously, in *United States vs. Bursey*, 491 F 2d 531 (CA 5 1974), the second

information the government received (in that case by tip/in this case by observation) indicated that the suspects were seeking narcotics in Texas, not Mexico. In order for the Court's ruling to correctly reflect the facts, it must be said that Officer Kitchen, at the time of the search, believed that Defendant had loaded Marijuana on a dirt road in South Texas. If this was the case, then it did not tend to corroborate the informant's tip that Whitaker had already loaded the Marijuana in Mexico. It necessarily follows that since there was no longer any reasonable suspicion of a Mexican transaction (R. 22, 29-30, R. 48) and no prior information regarding a Texas connection, evidence is not present to support probable cause.

The execution and extent of this search was constitutionally unreasonable since it was not justified by the officer's observations of the appellant and of his vehicle after the border crossing, search and clearance. In questioning the agent in charge of the second search, the trial Judge addressed this problem at page 68-69 in the record:

> The Court: All right, but I mean you had him under surveillance all the time, and you all never saw anybody unscrewing a false compartment under the bed and sticking marijuana in there or anything like that?
>
> A No Sir, we wouldn't be able to inside the cab.
>
> The Court: So the chances are that when that thing crossed that bridge it had that stuff in it?
>
> A Yes sir.

> The Court: Because it was no way for them to put it in there without you having noticed, you or somebody working with you, is that right?
>
> A I would believe so, sir.

Even the customs patrol agent in charge of the surveillance did not believe that the vehicle contained contraband when it left the bridge (R. 47). He stated, "I thought it was possible that they were going to pick up the contraband" (R. 47-48). This possibility had not been suggested by the information given to the officer (R. 38-39). He had received no information about a Texas connection or transfer. The officer, therefore, must have independently imagined this possibility. In fact, he observed no loading of contraband at any time before he stopped and searched the vehicle (R. 48, 49, 52, 53-54, 68-69).

C. *No Probable Cause Based Upon Mexican Connection.* There was no effort on the government's part to indicate that these two stops made by Defendant Whitaker caused any renewal of suspicion of a customs violation after the complete border search at Brownsville. When we consider the opportunity of the government agents to satisfy themselves at the bridge regarding the information about a customs violation, it is undisputable that no probable cause existed to search the Defendant a second time for a customs violation.

Nevertheless, the trial court fallaciously attempts to corroborate the information about a connection in Mexico by "two occasions during which the Defendant Whittaker could have picked up marijuana", both of

which were in Texas (*U.S. v. Meola and Whittaker*, Supra at 8). On both of these occasions, the Appellant also could have (and was) doing something other than "picking up marihuana".

Since there was no confidential information regarding a Texas connection and no observations supporting the information of a Mexican connection, there could not have been probable cause for the second search.

Nevertheless, in affirming the decision of the Trial Court, the Court of Appeals cited *United States v. Nieto*, (5th Cir. 1975) 510 F 2d 1118. The instant case involves substantially different facts and questions of law from those in *Nieto*.

In *Nieto*, the information was received by the federal drug agent after the vehicle left the border and while it was proceeding to the interior of the United States. In *Nieto*, only one search occurred and it was upheld under the theory of corroboration of prior information.

In summary, the *Nieto* case involved prior information, corroboration, a stop, search and seizure while this case includes prior information, corroboration at the bridge, negative search at the border crossing, release of vehicle and occupant, surveillance, observations, a stop, search, disassembly and seizure. By reason of these critical differences in the facts, the *Nieto* case is not dispositive of this case.

The primary question before the Court in our case is whether or not these observations during surveillance

constituted probable cause to stop and search the vehicle on the second occasion, and if so, whether or not the extent of the search was reasonable under the circumstances. As discussed extensively herein, we believe that the activities of the Defendant after entry into the United States were "susceptible to a variety of credible interpretations not necessarily compatible with nefarious activities" (*U.S. v. Selby*, supra). Since the surveillance failed to uncover any probable cause to search the Defendant in the second instance, the second search was unreasonable both in its occurrence and in its unlimited extent. To allow U.S. customs officers such license is to defeat a citizen's right to privacy as well as the intent and spirit of the fourth, fifth, ninth and fourteenth amendments to the constitution. To deny this petition would effectively license the United States customs officers to follow, keep under surveillance and repeatedly search without restriction any citizen entering our country.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully requests that this petition be granted, that a Writ of Certiorari issue from this Honorable Court, and that upon review, the judgment of the District Court in this cause be reversed, or alternatively, to conform the said judgment in accordance with the opinion of this Honorable Court.

Respectfully submitted,

Preston Henrichson
222 West Cano
Edinburg, Texas 78539
(512) 383-7453
Attorney for Appellant

APPENDICES

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA

versus Cr. No. 75-B-148

JOHN M. MEOLA and
WAYNE RONALD WITTAKER

Filed: Jul. 24, 1975

Honorable Edward B. McDonough, Jr., United States Attorney, of Houston, Texas, and Charles F. Sandoval, Assistant United States Attorney, of Brownsville, Texas; for the Government.

Roberto J. Yzaguirre, of McAllen, Texas; for the Defendant John M. Meola.

Henrichson & Henrichson (Preston Henrichson), of Edinburg, Texas; for the Defendant Wayne Ronald Wittaker.

MEMORANDUM AND ORDER

The Defendants, John M. Meola and Wayne Ronald Wittaker, stand charged by Grand Jury Indictment in Count One of importing approximately 126 pounds of

marihuana in violation of 21 U.S.C.A. §952(a); Count Two charges the Defendants with conspiring to possess, with intent to distribute, a quantity of marihuana in violation of 21 U.S.C.A. §846 and §841(a)(1); and Count Three charges the Defendants with possessing approximately 126 pounds of marihuana, with intent to distribute, in violation of 21 U.S.C.A. §841(a)(1). To these charges the Defendants have entered a plea of not guilty and have filed a Motion to Suppress.

On June 10, 1975, a hearing was held on the Defendants' Motions. At that hearing the Government called the Customs Officers Charles Lutz, Raymond Perez, Daniel Farrias, Balwin C. Fehlis, Jesus Gomez, Melvin Kitchen, and Drug Enforcement Administration Agent Victor C. Mason to the stand. The Defendants did not call any witnesses and rested at the close of the Government's evidence.

From the testimony taken into evidence at the hearing on the Motions to Suppress it appears that Customs Officers stationed in Miami, Florida, had received information from a previously reliable source that a person by the name of Whitaker would attempt to drive a 1971 black Chevrolet truck bearing a specified Florida license plate into the United States from the Republic of Mexico via Brownsville. The suspect would be carrying a load of marihuana which would be hidden in secret compartments in the truck. Customs Officers in Miami, Florida, passed this information on to Customs Officers stationed at Brownsville, Texas.

On February 27, 1975, at approximately 8:00 p.m. the above described black Chevrolet pickup truck driven

by the Defendant Wayne Ronald Wittaker arrived at the B & M Bridge in Brownsville, Texas, from Matamoros, Mexico. Because Customs had a lookout on this truck it was referred to secondary where Officers Farrias, Fehlis, and Gomez searched the cab and camper sections of the truck without finding any marihuana. The vehicle was then released, but not before Customs had arranged for Officer Kitchen to tail-out the vehicle as it left the bridge.

From the bridge the vehicle went to Denny's Restaurant which is nearby and there picked up a person later identified as the Defendant John M. Meola, who had been seen walking from the B & M Bridge with a knapsack on his shoulder. The vehicle and its two occupants then proceeded out of Brownsville via U.S. Highway 281, which is not the principal route from Brownsville to Edinburg. The car was kept under constant surveillance by a cadre of Customs vehicles and an airplane, with the exception of one time when the vehicle turned off the highway onto a dirt road and was out of sight for a minute or two. The vehicle returned to U.S. Highway 281 and continued heading north out of the Valley. When it became apparent to the officers that the vehicle was in fact leaving the Valley they stopped the vehicle to search it at a point that was about three miles south of Edinburg, Texas, at approximately 10:30 p.m. Concealed in secret compartments Officers Fritz and Kitchen found 47 bags of marihuana weighing approximately 126 pounds.

By way of their Motions the Defendants claim that this warrantless search was conducted without prob-

able cause and not pursuant to a border search in violation of the Fourth Amendment of the United States Constitution.

Mere proximity to the border does not alone qualify such a search as a border search. *United States* v. *Storm*, 480 F.2d 701 (CA 5 1973). At the same time, however, the fact that a search was conducted away from the border does not alone disqualify it as a border search. In *United States* v. *Bowman*, 502 F.2d 1215 (CA 5 1974), the Fifth Circuit examined the "extended border search" theory and set out the following standards for determining whether or not a search qualifies as an "extended border search":

> "Mere proximity to the border does not alone justify such a search. To hold that a search may be reasonably justified as an 'extended border search' requires a finding that the agent who conducted the search had reasonable cause at the time of the search to suspect a violation of the customs laws. And, at the time of the search, the suspect must have had some reasonably direct connection with the border, considering such factors as the cause for the initiation of the search, the distance from the border and original point of entry, and the time elapsed since entry."

In *Bowman, supra*, the Fifth Circuit found that a search conducted approximately two hours and fifteen minutes after the Defendants had crossed the border and at a point that was within three miles from the city limits of Laredo, Texas, where the Defendants had

crossed the bridge and while the suspicion of the Mexican transaction was still fresh and uncontradicted at the time of the search was justified as a "border search" which could be made on reasonable suspicion alone.

The *Bowman* Court took pains to distinguish another recent Fifth Circuit case, *United States* v. *Bursey*, 491 F.2d 531 (CA 5 1974). In that case the Fifth Circuit refused to characterize as a border search a search which occurred four days after the suspects had entered the United States and at a location 80 miles north of the border with only intermittent surveillance. In *Bursey* the Fifth Circuit held that under these circumstances any nexus with the border was clearly severed and thus ensuing search could be had only upon a showing of probable cause.

Although *Bowman* and *Bursey* do not by themselves clearly define the outer limits of the "extended border search" theory, the two cases do provide some guidelines in determining whether or not a search qualifies under the "extended border search" theory: the time elapsed between the entry into the United States and the search, the distance between the port of entry and the location of the search, intervening factors such as a negative search, which mitigate against the suspicion of a Mexican transaction or contact, and the continuity of surveillance. The search at bar occurred approximately two and a half hours after the suspects' entry into the United States. There was continual surveillance of the car from the time it entered into the United States until it was ultimately stopped and searched at about 10:30 p.m., with the exception of the

vehicle's short journey off U.S. Highway 281 up a dirt road where Customs Officers temporarily lost sight of the vehicle. While it is true that there was an intervening search when the suspect's vehicle entered into the United States that proved negative, Customs Officers observed that right after the vehicle left the bridge it picked up a passenger on foot with a knapsack who had apparently crossed the bridge concurrently with the vehicle. Additionally, the Officers did lose sight of the vehicle for a short time when it departed U.S. Highway 281 to drive up the dirt road. The search did occur quite a distance, about 60 miles, from the port of entry of the suspect's vehicle but in the mind of this Court this does not disqualify the search as a border search, particularly in light of the fact that Customs had never relinquished interest in this vehicle as is indicated by the large numbers of vehicles and officers who followed the vehicle after it entered the United States. Finally, the officers were in possession of information from Florida, which was in every detail corroborated by their own personal observations, that was sufficient to create a suspicion of a Mexican connection. This suspicion was not dissipated by the negative search at the bridge because after that search there were at least two opportunities for contraband to have entered the car: the mysterious passenger with the knapsack and the unexplained turnoff of U.S. Highway 281 onto a dirt road. On the authority of *United States* v. *Bowman, supra*, this Court holds that this was an extended border search which could be performed on reasonable suspicion alone. This Court further finds and holds that the circumstances as set out above were sufficient to make the officers reasonably suspicious of a customs violation. The search was in

all things legal and the Motions to Suppress are hereby denied.

In the alternative this Court finds that even if this search does not qualify as a border search the search was nevertheless legal as it was attended by probable cause. The evidence before this Court is that federal officers, acting on information supplied by a previously reliable confidential informant, establishing a roving surveillance on the vehicle identified by the informer. During this surveillance the officers observed at least two occasions during which the Defendant Wittaker could have picked up marihuana. When it became obvious that the Defendant was in fact leaving the Valley via an indirect route the officers stopped him to search his vehicle. While we now know that the marihuana was concealed in the vehicle when it crossed the bridge, this was not known at the time of the search and the searching officers had every right to believe that the contraband was taken on board after the vehicle left the bridge. Thus, the negative search at the bridge does not cut the nexus between the Defendant and the informer's information, which was corroborated in every particular by the officers. Because the search was attended by probable cause and the exigent circumstance of searching a moving vehicle out on the open highway, the Motions to Suppress must be denied.

The Defendant Wittaker has also filed a Motion to Disclose the Identity of the Informer. The Defendant has wholly failed to show that the identity of the informer is necessary to this Defendant's defense or that the informer's presence is required in order to give the

Defendant a fair trial. The Defendant Wittaker's Motion to Disclose the Identity of the Informer is hereby denied. *Roviaro* v. *United States*, 353 U.S. 53 (1956).

On June 16, 1975, the Defendant Wittaker appeared with counsel and in open court announced that he intended to waive a jury and submit the case to the Court on the evidence received by the Court in the Motion to Suppress hearing. On a previous date the co-Defendant John M. Meola appeared with counsel and in open court announced that he had made application to the Probation Office for the pre-trial diversion program.

Count One charges the Defendant Wayne Ronald Wittaker with importing approximately 126 pounds of marihuana in violation of 21 U.S.C.A. §952(a); Count Two charges the Defendant Wittaker with conspiring to possess, with intent to distribute, a quantity of marihuana in violation of 21 U.S.C.A. §846 and §841(a)(1); and Count Three charges the Defendant with possessing approximately 126 pounds of marihuana, with intent to distribute, in violation of 21 U.S.C.A. §841(a)(1). There is no question that the marihuana was concealed in the truck when the Defendant Wittaker drove it into the United States. Hence, the only question with regard to the Defendant's guilt in Counts One and Three is whether or not he knew that the marihuana was in the truck. Taking into account the highly sophisticated manner in which this marihuana was concealed, the mysterious appearance of the Defendant Meola on the scene right after the Defendant Wittaker crossed the truck into the United States, the use of a secondary highway rather than the

primary thoroughfare that runs through the area, and the completely unexplained deviation from U.S. Highway 281 up the dirt road, this Court can infer beyond a reasonable doubt that the Defendant Wayne Ronald Wittaker had knowingly involved himself in a scheme which required him to drive a truck which he knew to be loaded with marihuana into the country. Thus, this Court is persuaded beyond a reasonable doubt that the Defendant Wayne Ronald Wittaker did knowingly import approximately 126 pounds of marihuana as charged in Count One of the Indictment. This Court further finds beyond a reasonable doubt that the Defendant Wittaker did knowingly possess approximately 126 pounds of marihuana, an amount sufficient for this Court to presume commercial intent and hereby finds him guilty as charged in Count Three of the Indictment.

Count Two charges the Defendant Wittaker with conspiring to possess, with intent to distribute, a quantity of marihuana in violation of 21 U.S.C.A. §846 and §841(a)(1). This Court is persuaded beyond a reasonable doubt that the Defendant Wittaker conspired to possess a commercial quantity of marihuana with the Defendant John M. Meola and acted in furtherance of said agreement by driving the pickup truck with the concealed marihuana into the United States from the Republic of Mexico and later by transporting the marihuana on U.S. Highway 281 along with the co-Defendant John M. Meola. Therefore, this Court hereby finds the Defendant Wayne Ronald Wittaker guilty as charged in Count Two of the Indictment.

The Defendant Wittaker will present himself to the United States Probation Office in Brownsville, Texas, on Friday, August 1, 1975, and the U. S. Probation Officer is ordered to make a pre-sentence report on the Defendant. Sentencing is set for the 22nd day of August, 1975, at 9:30 a.m.

The Clerk will send copies of this Memorandum and Order to the Defendants, their counsel, the United States Attorney, and the United States Probation Officer.

DONE at Brownsville, Texas, this 24th day of July, 1975.

/s/ REYNALDO G. GARZA
Reynaldo G. Garza
UNITED STATES DISTRICT JUDGE

(SEAL)
TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, Clerk
/s/ JUAN Y. BABOU
Deputy Clerk

In the United States District Court for the Southern District of Texas, Brownsville Division

UNITED STATES OF AMERICA

versus No. 75-B-148

WAYNE RONALD WITTAKER

JUDGMENT AND COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date, August 22, 1975, with counsel Richard C. Smith pleading not guilty.

There being a finding of guilty.

Defendant has been convicted as charged of the offenses of importing approximately 126 lbs. of marihuana, in violation of Section 952(a), Title 21, United States Code, as charged in Count 1 of the Indictment; conspiring to possess, with intent to distribute, a quantity of marihuana, in violation of Sections 846 and 841(a)(1), Title 21, United States Code, as charged in Count 2 of the Indictment; and possessing approximately 126 lbs. of marihuana with intent to distribute, in violation of Section 841(a)(1), Title 21, United States Code, as charged in Count 3 of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or

appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or this authorized representative for imprisonment for a period of FOUR (4) YEARS and a special parole term of two (2) YEARS on each of Counts 1, 2, and 3; said sentence to run concurrently.

/s/ REYNALDO G. GARZA
Reynaldo G. Garza
United States District Judge

Date: August 27, 1975

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3536
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WAYNE RONALD WITTAKER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

(February 10, 1976)

Before WISDOM, THORNBERRY and SIMPSON, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1] *See also* United States v. Nieto, 5 Cir. 1975, 510 F.2d 1118.

---

* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

In the
United States Court of Appeals
for the Fifth Circuit

No. 75-3536

Wayne Ronald Whitaker,
Defendant-Appellant,
and Petitioner,

versus

United States of America,
Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Texas, Brownsville Division

PETITION FOR REHEARING

Petitioner-Appellant urges a rehearing of the instant case based upon the following grounds:

I.

In affirming the decision of the Trial Court in a per curiam opinion, this Honorable Court cited *United States v. Nieto*, (5th Cir. 1975) 510 F2d 1118. The instant case involves substantially different facts and questions of law from those in *Nieto*.

In our case, two searches occurred after information incriminating the Appellant was received at the U. S.

Custom's Office in Brownsville, Texas. The first search was a thorough customs-like search at the Brownsville International Bridge, and it satisfied the customs agents that no contraband was secreted in the vehicle, despite the prior information to the contrary (R. 37). The second search in our case occurred following certain observations by customs agents during continuous surveillance conducted after the release of the vehicle from the virtually unlimited search authority of the border crossing station. The primary question before the Court in our case is whether or not these observations during surveillance constituted probable cause to stop and search the vehicle on the second occasion, and if so, whether or not the extent of the search was reasonable under the circumstances.

In *Nieto*, the information was received by the federal drug agent after the vehicle left the border and while it was proceeding to the interior of the United States. In *Nieto*, only one search occurred and it was upheld under the theory of corroboration of prior information.

In our case the prior information was succinctly stated by the arresting officer in the record at page 39:

> "They had received information that a black 1971 Chevrolet pickup with a camper driven by Ron Whitaker would be going into Mexico, re-entering the United States at Brownsville, *and would have contraband hidden aboard the truck* (emphasis added)."

This information led to the extensive but unsuccessful border search and that portion of the information

which related to the contraband was negated thereby. Further, the later observations of the surveilling officers did nothing to corroborate the prior information concerning contraband in secret compartments of the vehicle. The arresting officer justified entirely the second search on suspicions aroused by the activities of the vehicle and its occupants after entry into the United States (R.50). The surveilling officers observed the vehicle driver pick up an apparent pedestrian acquaintance in a restaurant parking lot six or seven blocks from the bridge (R.71), which pedestrian "could have been coming from anywhere" (R.53). They also observed the driver with passenger travel 60 miles west and north from the bridge in the camper pickup with Florida license plates by well traveled U. S. Highway 281, except for a one to two minute stop on a side road for an unknown purpose but without observing any unusual activity (R.52-53). These activities were "susceptible to a variety of credible interpretations not necessarily compatible with nefarious activities" (*U.S. vs. Selby*, 407 F2d 241, (9th Cir. 1969)). Certainly, after his release from the bridge, the observed activities of the Appellant did nothing to corroborate the prior information about the alleged Acapulco, Mexico connection. Additionally, the prior information lends nothing of logical value to the officer's later consideration of the observed activities of the appellant.

It follows that the second search turned up no contraband that could have been concealed during the surveillance. The second search was fruitless until the officers disassembled the interior construction of the camper. The execution and extent of this search was constitutionally unreasonable since it was not justified by the officer's observations of the appellant and of his vehicle after the border crossing, search and clearance. In questioning the agent in charge of the second search, the trial Judge addressed this problem at page 68-69 in the record:

> The Court: All right, but I mean you had him under surveillance all the time, and you all never saw anybody unscrewing a false compartment under the bed and sticking marijuana in there or anything like that?
>
> A. No Sir, we wouldn't be able to inside the cab.
>
> The Court: So the chances are that when that thing crossed that bridge it had that stuff in it?
>
> A. Yes sir.
>
> The Court: Because it was no way for them to put it in there without you having noticed, you or somebody working with you, is that right?
>
> A. I would believe so, sir.

Even the customs patrol agent in charge of the surveillance did not believe that the vehicle contained contraband when it left the bridge (R.47). He stated, "I thought it was possible that they were going to pick up the contraband" (R.47-48). This possibility had not been suggested by the information given to the officer (R.38-39). He had received no information about a Tex-

as connection or transfer. The officer, therefore, must have independently imagined this possibility. In fact, he observed no loading of contraband at any time before he stopped and searched the vehicle (R.48, 49, 52, 53-54, 68-69).

In summary, the *Nieto* case involved prior information, corroboration, a stop, search and seizure while this case includes prior information, corroboration at the bridge, negative search at the border crossing, release of vehicle and occupant, surveillance, observations, a stop, search, disassembly and seizure. By reason of these critical differences in the facts, the *Nieto* case is not dispositive of this case.

Therefore, the uncontradicted testimony of the witnesses and the facts of which the trial Court took judicial notice place into issue the following unanswered questions of law in this appeal:

A. IS THE FEDERAL GOVERNMENT ENTITLED TO EXTEND ITS BORDER CUSTOMS-LIKE SEARCH POWER 60 MILES INTO THE UNITED STATES MERELY BY KEEPING SURVEILLANCE OVER A VEHICLE WHICH HAS BEEN CLEARED AND RELEASED AFTER A THOROUGH BORDER SEARCH? We think not (see U.S. v. Ortiz, 95 S. Ct. 162 (1975); U.S. v. Almeida-Sanchez, 413 U.S. 266 (1973); Carroll v. U.S., 267 U.S. 132, 154 (1925); U.S. v. Speed, 497 F 2d 546 (5th Cir. 1974) rev'd on other grounds; U.S. v. Kandlis, 432 F 2d 132 (9th Cir. 1970); U.S. v. Selby, 407 F 2d 241 (9th Cir. 1969)).

B. DOES A CAREFUL, THOROUGH AND NEGATIVE BORDER SEARCH (WHICH SEARCH SATISFIES THE SEARCHING CUSTOMS OFFICERS THAT NO CONTRABAND IS CONTAINED IN AN ENTERING VEHICLE), EFFECTIVELY INVALIDATE AND NEGATE PRIOR INFORMATION THAT CONTRABAND OBTAINED IN MEXICO IS CONTAINED IN THE VEHICLE? We believe it does; otherwise, the government would be able to follow, keep under surveillance and repeatedly search a citizen without restriction if probable cause to search is ever once established. This would violate the citizen's right to privacy as well as his right to be free of unreasonable search and seizure.

C. WHEN PRIOR INFORMATION ALLEGES THAT CONTRABAND WAS OBTAINED IN ACAPULCO, MEXICO, FOR SMUGGLING INTO THE UNITED STATES IN SECRET COMPARTMENTS IN A CERTAIN VEHICLE (R. 12-13, 39), AND WHEN SUCH INFORMATION IS NEGATED BY THOROUGH AND NEGATIVE CUSTOMS SEARCH OF THE VEHICLE, HOW IS SUCH INFORMATION CORROBORATED BY CONTINUOUS VEHICLE SURVEILLANCE WHICH OBSERVES THE FOLLOWING: (1) THE VEHICLE DRIVER PICKS UP AN APPARENT PEDESTRIAN ACQUAINTANCE WITH KNAPSACK IN A RESTAURANT PARKING LOT SIX OR SEVEN BLOCKS NEAR THE BRIDGE (R. 71), WHO "COULD

HAVE BEEN COMING FROM ANYWHERE" (R. 53); AND (2) THE DRIVER TRAVELS 60 MILES WEST AND NORTH FROM THE BRIDGE POINT OF ENTRY IN SAID VEHICLE WITH FLORIDA LICENSE PLATES BY WELL TRAVELLED U.S. HIGHWAY 281 EXCEPT FOR A ONE TO TWO MINUTE STOP DOWN A SIDE ROAD FOR AN UNKNOWN PURPOSE BUT WITHOUT ANY UNUSUAL ACTIVITY HAVING BEEN OBSERVED DURING THE STOP (R. 52-53)? We believe that this constitutes no relevant corroboration of the prior information and the prior information lends no logical support or cause for the second search.

D. DO SUCH OBSERVATIONS OUTLINED IN D. ABOVE BY THEMSELVES CONSTITUTE PROBABLE CAUSE (OR EVEN REASONABLE SUSPICION) TO STOP THE VEHICLE AND TO DISASSEMBLE AND SEARCH THE INTERIOR CONSTRUCTION OF THE CAMPER WITHOUT A WARRANT DESPITE THE THOROUGH AND NEGATIVE SEARCH OF THE ENTIRE CAMPER AT THE BRIDGE AND DESPITE THE ADMISSION BY THE SEARCHING OFFICER THAT HE DID NOT BELIEVE THAT THE VEHICLE CONTAINED CONTRABAND WHEN THE VEHICLE LEFT THE BRIDGE (R. 47), AND DESPITE THE OFFICER'S ADMISSION THAT THE CONTRABAND IN QUESTION WAS FOUND IN A LOCATION WHERE IT COULD NOT HAVE

BEEN PLACED DURING THE SURVEILLANCE BUT WHICH MUST HAVE BEEN PRESENT BEFORE THE VEHICLE CROSSED THE BRIDGE (R. 63-66, 68-69)? It is our position and belief that the observed circumstances do not constitute probable cause to stop and search the vehicle on the second occurrence (see U.S. v. Kandlis, 432 F 2d 132 (9th Cir. 1970); U.S. v. Selby, 407 F 2d 241 (9th Cir. 1969)). Further, the extent of the second search was unreasonable based on the continuous observations of the officers and the previous extensive bridge search (Fourth Amendment, U.S. Constitution).

E. IF THE OBSERVATIONS SET OUT IN D. ABOVE CONSTITUTE REASONABLE SUSPICION, IS REASONABLE SUSPICION CONSTITUTIONALLY SUFFICIENT TO SUPPORT A FEDERAL STOP, DISASSEMBLY AND SEARCH OF THE INTERIOR CONSTRUCTION OF A VEHICLE OF A U.S. CITIZEN WITHOUT A WARRANT ON A MAJOR ARTERIAL HIGHWAY SOME 60 MILES INTO THE UNITED STATES FROM POINT OF ENTRY OF THE VEHICLE, WHEN THE VEHICLE HAS BEEN UNDER CONSTANT SURVEILLANCE SINCE ENTRY AND AFTER THE VEHICLE WAS THOROUGHLY SEARCHED AND CLEARED IN A BORDER CUSTOMS SEARCH AT THE BRIDGE? We believe that reasonable suspicion is insufficient cause to stop and search the vehicle (U.S. v. Ortiz, Supra; U.S. v. Almeida-Sanchez, Supra).

These issues may not have been adequately addressed in the briefs of both parties to this appeal but they cry out for definitive answer by this Honorable Court. Appellant respectfully requests that this petition for rehearing be granted in all or any of these issues and that such issues be resubmitted to this Court on briefs and upon oral argument.

II.

Shortly before submission date, government appellate counsel addressed a letter commentary on the merits of Appellant's appeal to the panel considering such appeal. The Government letter offered this Court an informal and shorthand summary of the "facts of this case", the "question" that "arises", the contentions of the Appellant, a comment on the trial court's opinion, a reference to some "inquiry" which is apparently outside of the record, some speculation about this undefined "inquiry" and the position of the government in the appeal. A copy of the government letter is attached hereto for reference as Exhibit A. The undersigned counsel received a copy of such letter on February 9, 1976, and the trial court decision was affirmed per curiam by the panel on February 10, 1976. For this reason, I was not afforded an opportunity to reply to the government counsel's letter summary before the submission date. Needless to say, I vociferously disagree with much of the content of the letter. I would therefore request that this Honorable Court grant this petition for rehearing and give the Appellant a fair and adequate opportunity for reply to this most recent and unexpected pleading by the government.

III.

The undisputed testimony in the trial record and in the facts of which the trial Judge took judicial notice have been grossly confused, misquoted and misapplied in the written opinion of the trial court, in the government brief and in the letter commentary by government counsel which was addressed to this Honorable Court immediately before the submission of this case. The net effect of such confusion and misapplication of the relevant facts to the applicable law was apparently not effectively overcome in Appellant's brief, especially since we have had no opportunity to reply to the government's letter. As set out in paragraph I above, the fact that *U.S. v. Nieto* was cited by the Court indicates further that the facts in this case have been obscured or at least not effectively presented to this Court. For these reasons, Appellant requests that this Motion for Rehearing be granted in order that counsel for the Appellant be afforded an opportunity to more effectively set out the relevant facts and the applicable law. Further, in light of the widely divurging statements of facts and interpretations of the testimony, this Honorable Court should avail itself of another opportunity to review the record and make its own assessment of the relevant facts, in order that justice be done.

Respectfully submitted,

Preston Henrichson
222 West Cano
Edinburg, Texas 78539
(512) 383-7453

Attorney for Appellant

EXHIBIT A

United States Department of Justice

UNITED STATES ATTORNEY
Southern District of Texas
12000 Federal Building
and U.S. Court House
515 Rusk Avenue
Houston, Texas 77002

February 6, 1976

Honorable Edward W. Wadsworth
Clerk, U.S. Court of Appeals
For the Fifth Circuit
Room 102, 600 Camp Street
New Orleans, La. 70130

Re: No. 75-3536 — U.S.A. v. Wayne Ronald Whittaker

Dear Sir:

We have been advised that this case has been placed upon the summary calendar and will not be argued. In view of this, we request that the letter which follows (submitted in four copies, with copy to opposing counsel), be submitted to the panel which decides the case.

The facts of this case involved a "camper" truck which was driven into the United States from Mexico

at Brownsville, Texas. The vehicle had been the subject of an informer's tip and was searched at the bridge, but no marihuana was found at the time. The vehicle was placed under surveillance and was later stopped and searched again, whereupon one hundred twenty-six pounds of marihuana was discovered concealed in various places in the vehicle. The question thus arises as to the point in time at which the marihuana was placed in the vehicle, whether before the vehicle entered the United States or after, possibly at a time when the vehicle briefly eluded surveillance and was driven up a dirt road off U.S. Highway 281.

The appeal presents two principal contentions, the first going to the lawfulness of the search in which the marihuana was found, and the second to the sufficiency of the evidence. The question of the search may, of course, be dispositive of the appeal. If the search is upheld, the sufficiency question will be reached.

Judge Garza's opinion, filed in connection with the motion to suppress evidence, states that, "While now know that the marihuana was concealed in the vehicle when it crossed the bridge, this was not known at the time of the search, and the searching officers had every right to believe that the contraband was taken on board after the vehicle left the bridge." Inquiry indicates that this conclusion, which may very well be the case, perhaps owes something to statements made after his arrest by the co-defendant Meola, who is not a party to this appeal, which statements are presumably not binding on the present appellant.

It is the position of the government that the evidence is sufficient to support the convictions on both counts, whichever hypothesis as to when the marihuana was placed on the vehicle is correct. If it was on board when the vehicle crossed the Brownsville bridge, the appellant imported it in the most literal sense. If it was crossed by a Mexican supplier pursuant to an arrangement previously made with the appellant, the latter would be equally guilty as a conspirator as charged, and as a principal to the importation by virtue of 18 U.S.C. §2. Since the appellant would be guilty as charged under either theory, it is submitted that the evidence is sufficient.

Very truly yours,

EDWARD B. McDONOUGH, JR.
United States Attorney

JAMES R. GOUGH
Assistant United States Attorney
Chief, Appeals-Research Division

EBMcDJr:JRG:gt

cc: Mr. Preston Henrichson

In the United States Court of Appeals
for the Fifth Circuit

No. 75-3536

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WAYNE RONALD WITTAKER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING
(March 15, 1976)

Before WISDOM, THORNBERRY and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

In the United States Court of Appeals
for the Fifth Circuit

No. 75-3536

WAYNE RONALD WHITAKER,
Defendant-Appellant,
versus

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Texas, Brownsville Division

MOTION TO STAY ISSUANCE OF MANDATE

Appellant-Defendant, WAYNE RONALD WHITAKER, AKA, WITTAKER, files this Motion to Stay Issuance of Mandate and in support thereof says as follows:

I.

Appellant-Defendant has retained counsel to file an Application for Writ of Certiorari to the Supreme Court of the United States on the following substantial questions:

A. What effect does a thorough, negative bridge search have upon the prior information leading to such search;

B. Can the government constitutionally extend the limits of the border customslike

search into the interior of the United States by continuous surveillance of a citizen and make a constitutional second search; and

C. After the first search at the border, did the observations during surveillance constitute probable cause to stop and search the vehicle.

II.

Appellant-Defendant has deposited $5,000.00 with the District Clerk of the Southern District of Texas, Brownsville Division, and has executed a $50,000.00 appearance bond. Appellant-Defendant has never failed to make a required appearance in connection with this case and it would unnecessarily cause hardship to Defendant-Appellant and to his family.

WHEREFORE, PREMISES CONSIDERED, Appellant-Defendant respectfully requests this Honorable Court to stay the issuance of the mandate until further order of the Court or until final disposition by the Supreme Court.

Respectfully submitted,

Preston Henrichson
222 West Cano
Edinburg, Texas 78539
(512) 383-7453

Preston Henrichson
Attorney for Appellant-Defendant
Wayne Ronald Whitaker, aka,
Wittaker

In the United States Court of Appeals
for the Fifth Circuit

No. 75-3536

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WAYNE RONALD WITTAKER,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ORDER:

IT IS ORDERED that the motion of appellant filed in the above styled and numbered cause for a stay of the issuance of the mandate pending his petition for writ of certiorari in this cause be, and the same is hereby DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

/s/ HOMER THORNBERRY
UNITED STATES CIRCUIT JUDGE

Supreme Court, U. S.
FILED
JUL 8 19
MICHAEL RODAK, JR.

No. 75-1486

In the Supreme Court of the United States

OCTOBER TERM, 1976

WAYNE RONALD WHITAKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
WILLIAM G. OTIS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1486

WAYNE RONALD WHITAKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1976. A petition for rehearing was denied on March 15, 1976 (Pet. App. 27a). The petition for a writ of certiorari was filed on April 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Customs Patrol agents had probable cause to search petitioner's camper.

STATEMENT

Following a jury-waived trial in the United States District Court for the Southern District of Texas, petitioner was convicted of three counts charging importation of marihuana, possession of marihuana with

intent to distribute, and conspiring to possess marihuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1), 846, and 952(a). He was sentenced to concurrent terms of four years' imprisonment on each count, to be followed by two years' special parole. The court of appeals affirmed *per curiam* (Pet. App. 13a).

The facts are not in dispute and are fairly summarized in the opinion of the district court (Pet. App. 2a-3a):

> Customs Officers stationed in Miami, Florida, had received information from a previously reliable source that a person by the name of Whitaker would attempt to drive a 1971 black Chevrolet truck bearing a specified Florida license plate into the United States from the Republic of Mexico via Brownsville. The suspect would be carrying a load of marihuana which would be hidden in secret compartments in the truck. Customs Officers in Miami, Florida, passed this information on to Customs Officers stationed at Brownsville, Texas.
>
> On February 27, 1975, at approximately 8:00 p.m. the above described black Chevrolet pickup truck driven by the Defendant Wayne Ronald Wittaker [*sic*] arrived at the B&M Bridge in Brownsville, Texas, from Matamoros, Mexico. Because Customs had a lookout on this truck it was referred to secondary where [three officers] searched the cab and camper sections of the truck without finding any marihuana.[1] The vehicle was then released, but not before Customs had arranged for Officer Kitchen to tail-out the vehicle as it left the bridge.

[1]The search did not reveal any hidden compartments. However, one of the officers found a pistol wrapped in a cloth underneath the front seat (Tr. 25).

From the bridge, petitioner drove the camper to a nearby restaurant where he parked. He then whistled and waved to a man, later identified as John Meola, whom officers had seen walking from the bridge carrying a knapsack. Meola ran over to the camper and got in (Tr. 48). Petitioner and Meola then drove out of Brownsville on a secondary highway, roughly parallel to the border, under the surveillance of Customs officers who followed in several cars and a helicopter. Surveillance was maintained until petitioner turned off the highway down a dirt road, when he was out of sight for about two minutes (Pet. 49-52; Pet. App. 3a). After petitioner's vehicle returned to the highway, the officers stopped and searched it. Concealed in secret compartments in the camper the agents found 47 bags of marihuana weighing approximately 126 pounds (Pet. App. 3a).

ARGUMENT

The "factual and practical considerations" (*Brinegar* v. *United States*, 338 U.S. 160, 175) upon which the second search was based were reasonable under Fourth Amendment standards. Customs officials had received exceptionally specific information, from a source proved reliable on numerous occasions (Tr. 11-12), that one Whitaker would attempt to smuggle contraband into the country. Petitioner thereafter entered at the location the informant had named, in a vehicle that matched in make, model, age, color, and license number the one the informant had described. Cf. *Draper* v. *United States*, 358 U.S. 307. Although no drugs were found in the initial search, customs agents did find a gun under the front seat of the truck and, as the district court noted (Pet. App. 6a), they "observed that right after the vehicle left the bridge it picked up a passenger on foot with a knapsack who had apparently crossed the bridge concurrently with the vehicle," to whom petitioner

waved and whistled. Thereafter, petitioner and his passenger drove out of Brownsville on a secondary road, and, when they turned off onto a dirt road for several minutes, eluded the officers who had been watching them.

In light of the information customs officials had before petitioner reached the border, and in light of petitioner's activities after he left the border checkpoint, there was probable cause for a second search. See *United States* v. *Nieto*, 510 F. 2d 1118 (C.A. 5); *United States* v. *Bowman*, 502 F. 2d 1215 (C.A. 5).[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
WILLIAM G. OTIS,
Attorneys.

JULY 1976.

---

[2]Petitioner's contention that the scope of the second search violated his Fourth Amendment rights is insubstantial. The search did not involve the "disassembly" (Pet. 5) of his vehicle but only the removal of several screws from two secret compartments in the interior of the camper (Tr. 64-66).

Furthermore, since the district court correctly found that the customs agents had probable cause for the search (Pet. App. 7a), there is no need to consider whether the search could also be justified as an "extended border search" (see Pet. App. 4a-6a).